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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 777

RAYMOND W. FLEMING
Petitioner,

-versus-

MICHAEL S. WOLKE,
Sheriff of Milwaukee County,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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Raymond W. Fleming, the petitioner herein, respectfully prays that a writ of certiorari issue to review the final Judgment of the Supreme Court of Wisconsin, entered on the first day of September, 1964, which *reversed* the Judgment of the Circuit Court for Milwaukee County discharging the petitioner on a writ of *habeas corpus*.

OPINION BELOW

The opinion of the Supreme Court of Wisconsin is reported in 24 Wis. (2d) 606, and in 129 N.W. (2d) 841, and it appears in the record on this petition at page 68.

JURISDICTION

The Judgment of the Supreme Court of Wisconsin was rendered September 1, 1964.

A motion for rehearing was duly made thereafter, which was denied by the Supreme Court of Wisconsin on October 27, 1964.

The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

Does a state, which by statute permits an unlimited, as to scope or duration, secret pretrial discovery examination by a magistrate and prosecutor of a person about to be charged with an infamous crime and denies him his right to counsel in such examination, and compels him by subpoena to appear and testify under oath without being apprised in any way of his status or rights and which deceives him into believing he was a State witness when such examination results in a criminal complaint and warrant against such person, violate the personal rights of a United States citizen guaranteed by the Fifth, Sixth, and Fourteenth Amendments and is such "John Doe" statute prohibited under the Fourteenth Amendment?

Does such procedure followed by the State of Wisconsin against the petitioner under its "John Doe" statute as set forth above comply with the fundamental requirements of fairness and due process imposed by the Fourteenth Amendment?

Are the personal rights guaranteed by the Fifth Amendment divisible and severable with only a part of the personal guarantees contained therein applicable to the states so as to permit a state to charge a person with

infamous crimes without presentment or indictment by a Grand Jury by substituting therefor "John Doe" proceedings sanctioned and conducted as set forth in the Statement of the Case?

Where the petitioner is made to answer for infamous crimes based upon and resulting from proceedings as hereinbefore described in violation of his personal rights as guaranteed to him under the United States Constitution, do such proceedings provide sufficient due process of law so as to form the basis of depriving the petitioner of his liberty?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENTS TO THE UNITED STATES CONSTITUTION

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI

* * *

Article XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WISCONSIN CONSTITUTION

Article I

Declaration of Rights

Prosecutions; second jeopardy; self-incrimination; bail; habeas corpus. Section 8. No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.

WISCONSIN STATUTES INVOLVED

954.025 John Doe proceeding. If a person complains to a magistrate that he has reason to believe that a crime has been committed within his jurisdiction, the magistrate shall examine the complainant on oath and any witnesses produced by him and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the magistrate may proceed in such examination is within his discretion. The examination may be adjourned and may be secret. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint shall be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. The record of such pro-

ceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only the extent that it is so used.

Sec. 255.10 Wis. Stats. et seq: Grand jury. (Appendix A)

STATEMENT OF THE CASE

The petitioner, who was a clerk of court, was served on August 21, 1962, with a subpoena (Appendix B, 1 & 2), to appear on the same morning and give evidence on the part of the State in a "John Doe" proceeding. The examination was conducted under sec. 954.025 Wis. Stats. The judge who issued the subpoena conducted the secret proceeding. The petitioner was sworn and interrogated under oath at length. The subpoena not only commanded his appearance but commanded him to "give evidence" as a State witness.

At no time before or during his interrogation or testimony was he advised that his status was that of the accused, or of his rights. He actually had been deceived by the subpoena to believe that he was a witness on behalf of the State. Under the circumstances, he had been given no reason to even consider whether he should consult with counsel.

As a result of the "John Doe" proceedings, the petitioner was held to answer for infamous crimes by a criminal warrant signed by the "John Doe" magistrate on January 8, 1964 (R. 34-47). The "John Doe" proceeding was started sometime in the early part of 1962, continuing until at least January, 1964 (R. 9). The criminal complaint against the petitioner wholly resulted from the "John Doe" proceeding and a warrant was issued thereon and the petitioner arrested (R. 8). He

duly petitioned for a writ of *habeas corpus* (R. 4). In those proceedings the state admitted by demurrer the allegations in the petition and traverse, principally, to wit:

That the Circuit Court Judge acting as a magistrate initiated in the early months of 1962, an investigation and inquisition allegedly under sec. 954.025 Wis. Stats. (R. 11).

That the criminal warrant against the petitioner was wholly based upon information obtained as a result of said "John Doe" proceeding (R. 11, 17).

That the magistrate did not receive a complaint on oath as required by the "John Doe" statute, a prerequisite to proceeding under such statute (R. 11).

That subpoenas were used to compel persons suspected or accused, such as the petitioner, to appear before the magistrate and testify under oath (R. 15).

That the "John Doe" consisting of the magistrate and representatives of the Attorney General investigated activities which in their opinion were proper subjects for investigation without a Complaint (R. 15).

That persons charged with crime by either the State or Federal Court whose prosecutions were pending were summoned to appear in the proceeding; and the federal prosecutor was permitted to be present and hear the interrogation of a witness against whom charges were pending in Federal Court (R. 16, 26, 27).

That prior to the calling of the petitioner, pursuant to the subpoena, he, in effect, was an accused in the minds of the magistrate and other participants in said investigation and inquisitorial proceeding.

That by reason of the manner in which the petitioner was interrogated without advising him that he was a 'suspect' and 'a prospective defendant' the petitioner was compelled to give evidence to be used by said inquisitorial proceeding against the petitioner (R. 20).

That notwithstanding the fact that his status before the magistrate was that of an accused, the petitioner's interrogation was an investigation into the petitioner's alleged guilt, the purpose of which interrogation was unknown to the petitioner; without advising him of his status, the petitioner was compelled to give evidence with respect to himself before said inquisitorial proceeding (R. 17, 20).

That said proceeding constituted a trial of the petitioner in chambers without formal complaint, without advising petitioner of the purposes of said investigation and in the absence of counsel for the petitioner, all in violation of petitioner's rights guaranteed to him by the Constitution of the United States of America (R. 18).

That only after the conclusion of the testimony of the petitioner given pursuant to subpoena was he advised of his status as, in effect, the accused (R. 18, 21).

The Circuit Judge before whom the *habeas corpus* proceedings were conducted discharged the petitioner ruling the "John Doe" proceedings were illegally conducted (R. 8).

The Wisconsin Supreme Court reversed and ruled that if any of the petitioner's Constitutional rights were violated, they could be remedied on the trial under the rules

of evidence on a motion to suppress the evidence. 24 Wis. (2d) 606, 617; 129 N.W. (2d) 841, 847 (R. 76, 77).

The rights and privileges of the petitioner under the Constitution of the United States and the Amendments thereto were specifically raised and pleaded by the petitioner in the application for a writ of *habeas corpus* and were duly raised and repleaded in the traverse. The provisions thus raised were the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The rights and privileges of the petitioner under the United States Constitution were specifically repeated, urged, and argued before the Supreme Court of Wisconsin at all stages of proceedings before that Court.

The state's theory as to the Constitutional rights of the petitioner in the proceeding was succinctly stated at page 27 of its brief before the Wisconsin Supreme Court.

> It is not his (magistrate) duty to try issues of guilt or innocence and thus *the procedural safeguards which the constitution* (sic) *requires at a trial do not apply to the John Doe.* (Emphasis supplied)

The Supreme Court of Wisconsin did not reach this conclusion with respect to the Constitutional rights and privileges claimed by the petitioner but did state with respect thereto as follows: 24 Wis. (2d) 606, 617; 129 N.W. (2d) 841, 847:

> "The other arguments of the defendant do not involve questions of jurisdictional defects or the facts do not constitute such a defect. The form of the subpoena used in the John Doe proceeding did not deprive the magistrate of jurisdiction to issue the warrant. If the defendant believes the subpoena was improper he could have refused to testify; having testified, the defendant waived his objection. Nor

does the defendant's argument that he was compelled to testify while a suspect in violation of the Fifth and Fourteenth amendments of the United States constitution raise a jurisdictional question. The Fifth amendment is now applicable in effect to state proceedings by virtue of the Fourteenth amendment. Malloy vs. Hogan (1964), 378 U.S. 1, 84 Sup. Ct. 1489, 12 L.Ed. (2d) 653. *If the defendant should not have been interrogated while a suspect without warning or advice that he was a suspect, his testimony was illegally obtained and the question of its use can be raised by a proper motion to suppress* under sec. 955.09, Stats." (Emphasis supplied)

The Court touched again on some of the Constitutional questions raised in the following language: 24 Wis. (2d) 606, 618; 129 N.W. (2d) 841, 847:

"Defendant also argues his imprisonment is illegal because in violation of the Fifth and Fourteenth amendments of the United States constitution since he was entitled to immunity for testifying under sec. 325.24, Stats., except for perjury which is not charged. Under State v. Davidson (1943) 242 Wis. 406, 8 N.W. (2d) 275, the immunity of that statute applies only when the defendant claims his constitutional privilege against self-incrimination, which was not done by this defendant. The Davidson decision is not affected by any contrary federal standard interpreting the Fifth amendment. The decision of United States v. Monia (1943), 317 U.S. 424, 63 Sup. Ct. 409, 87 L.Ed. 376, construing a somewhat similar federal statute as providing an automatic immunity does not establish a federal standard applicable to the facts before us nor is it binding upon this court in its construction of what the Wisconsin legislature meant in creating sec. 325.24 Stats. Additionally, *since the defendant's right under the constitution may be waived, a violation of such right is not jurisdictional but judicial error,* State ex rel. Isen-

ring v. Polacheck (1898), 101 Wis. 427, 77 N.W. 708, *and such errors may be governed by the harmless-error rule,* Pulaski v. State, ante, p. 450, 129 N.W. (2d) 204." (Emphasis supplied)

REASONS FOR GRANTING WRIT

This Court has given indication by a chain of decisions that the personal rights safeguarded by the first eight amendments against national action should also be safeguarded against state action for the reason that denial of these personal rights would be a denial of due process of law.

It is respectfully submitted that the personal right guaranteed by the first clause of the Fifth Amendment should be included in those safeguarded; to wit:

> "No person shall be held to answer for a(n) * * * infamous crime, unless on a presentment or indictment of a Grand Jury, * * *"

It is recognized that this Court in *Hurtado vs. State of California* (1884), 110 U.S. 516, 538, 4 S. Ct. 111, 292, 28 L.Ed. 232, ruled that the words, "due process of law" in the Fourteenth Amendment of the Constitution, do not necessarily require indictment by a Grand Jury in a prosecution by the State of a crime. The Court in reaching this decision gave many cogent reasons and contentions why a contrary rule would be desirable, but ruled as it did specifically contemplating a proceeding, by a magistrate, certifying to the probable guilt of the defendant, with the right on accused's part to the aid of counsel, and to the cross examination of the witnesses produced for the prosecution which would be equivalent to the due process of law represented by the Grand Jury.

It is respectfully submitted, in the light of trial by time and of the abuses arising out of the substitutions for

the Grand Jury such as the "John Doe" in the case at bar, the dissenting Justice's opinion should be reconsidered for acceptance. After tracing the centuries of evolvement of the Grand Jury system and the authorities with respect thereto and the safeguards provided thereby, he concluded, in effect, that the Grand Jury requirement contained in the Fifth Amendment was an integral element of due process of law protecting the fundamental principles of liberty and justice which were recognized when the Fourteenth amendment was adopted to secure the citizen liberty and justice and involved in due process of law as required by that amendment in proceedings conducted under the sanction of a state and it was the supreme law of the land.

The Court indicated in *Malloy vs. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. (2d) 653, that Federal standards are applicable in determining whether the accused's rights guaranteed to him under the Fifth Amendment have been violated. The Court held the Fourteenth Amendment guaranteed to the petitioner the protection of the Fifth Amendment privilege against self-incrimination under applicable Federal standards. This shift by the Court was pointedly made to reflect that the American system of criminal prosecution *is accusatorial not inquisitorial,* and that the Fifth Amendment privilege is its essential mainstay.

It is respectfully submitted that the dichotomy of the State and Federal standards as to what constitutes due process for the prosecution of any person for an infamous crime should be removed and that a Federal standard under the Constitution should apply as a minimal uniform standard throughout the land. The elementary requirement of equal protection begs such uniformity.

No person such as the petitioner should be held to answer for any alleged infamous crime as a result of an Inquisition or Star Chamber form of proceeding. Appellate courts are cluttered with appeals resulting from abuses spawned by varied systems which substitute for the Grand Jury system. This case contrasts the Federal Grand Jury procedure in terms of the requirements of due process to the alternatives which have developed such as the magistrate herein whose examination by statute was bound solely by his own discretion. The prophetic dissent in *Hurtado v. California* (1884) 110 U.S. 516, 538, 28 L.Ed. 232, 4 S.Ct. 111, 292, forecast the inroads by the state utilized as ersatz Grand Jury procedure.

Wisconsin has provision for a Grand Jury (Appendix A) but the "John Doe" proceeding is utilized to provide a so-called 'short cut' to evade the Grand Jury procedure. It is respectfully contended, that there are no short cuts to due process of law. What is prohibited to a Grand Jury in its proceedings to arrive at a criminal indictment should not be allowed to be endowed by states to a two-man inquisition with no limit as to the discretion to be exercised. See 22 F.R.D. 343 for a discussion of Grand Jury procedures and requirements.

The mischief accomplished when the safeguards of due process should be required, but are not adhered to, is raised in this petition before the Court. Under the State's statutory proceedings, a magistrate and a prosecuting attorney were authorized between themselves to commence and conduct a secret inquisition. The extent of examination was bounded only by the magistrate's discretion. He was given by the statute the power of subpoena and the authority thereby to compel attendance

and testimony. This is further demonstrated by the legislative history of the statute.

1960 Wisconsin Annotations 954.025

"History: 1949 c. 631; Stats. 1949 s. 354.025; 1953 c. 601; 1955 c. 660 s. 13; Stats. 1955 s. 954.025.

"Comment of Advisory Committee, 1949: The John Doe procedure which has been established by the courts has been written into 354.025 to make the remedy more readily available and better understood. (Bill 474-S)

"On complaint that a criminal offense has been committed the magistrate may cause witnesses other than the complainant to be subpoenaed and may examine them on oath to ascertain whether such offense has been committed, and, if so, by whom. A witness who has been subpoenaed and refuses to be sworn or to testify may be punished as for contempt. In conducting the examination the magistrate exercises judicial powers, and the scope of his investigation is not limited as to time. State ex rel. Long v. Keyes, 75 W 288, 44 NW 13."

The accused in this pretrial discovery proceeding is not named. When he appears as a witness he is not required to be advised of his status or informed of his rights as the accused. There is no provision for the right to counsel. The subpoena was drafted in such a manner as to lead the accused to believe he is to give testimony on the part of the State. The contemplated work product of the statutory proceedings are: a criminal complaint, criminal warrant, and evidence to support conviction.

It is from an examination of such proceedings that the ultimate judicial wisdom of the history of the Common Law as cast in the first eight amendments and particularly the Fifth Amendment becomes clear and all the more

precious. The Fourteenth Amendment should make these safeguards available to all United States citizens.

In the original state that had both the Grand Jury and "John Doe" procedure, certain safeguards are held inviolate as to both these procedures.

People v. Waterman (1961) 9 N.Y. (2d) 561, 216 N.Y.S. (2d) 70, 175 N.E. (2d) 445

People v. Laino (1961) 10 N.Y. (2d) 161, 218 N.Y.S. (2d) 647, 176 N.E. (2d) 571

People v. Gillette (1908) 111 N.Y.S. 133, 26 App. Div. Reports 665

People v. Steuding (1959) 189 N.Y.S. (2d) 166, 160 N.E. (2d) 468

In the recent case of *Escobedo v. Illinois* (1964), 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. (2d) 977, this Court was asked to suppress a confession obtained after the accused had requested the right to consult with counsel. The Court held, as material to this petitioner, that where an investigation focuses upon a specific suspect in a process of interrogation that lends itself to illiciting incriminating statements and the suspect has been denied his right to consult with a lawyer and the police have not effectively warned him of his Constitutional rights to remain silent, the accused has been denied his right to counsel in violation of the Sixth Amendment to the Constitution which is made obligatory upon the States by the Fourteenth Amendment.

The Court referred to a test for due process which, it is respectfully urged by this petition, should apply to the petitioner under the instant circumstances:

> Has the petitioner been deprived of counsel for any part of the pre-trial proceedings to his prejudice so

as to infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice?

It is respectfully stated that no question is being raised with respect to the rights of police or other duly constituted law enforcement agencies to conduct and carry on investigations into unsolved crime in the manner provided by law. The condemnation we ask the Court to consider is: where the judicial authority of the State is combined with that arm of the State which is charged with prosecuting crime in a statutory secret pre-trial discovery proceeding and given unlimited discretion as to the extent of examination, does the right inhere as a result of such inquisition to charge persons, including the accused, who was subpoenaed and examined in such proceedings contrary to his Constitutional rights, to answer for infamous crimes?

We request the Court to consider whether the requirements of due process of law and the first clause of the Fifth Amendment, as applied to the petitioner who has been called upon to answer for infamous crimes, guaranteed to him the right to the safeguards required under the Grand Jury system as presently required in Federal prosecutions. This concept of due process of law, it is respectfully submitted, should be a standard made applicable by the Fourteenth Amendment as the law of the land.

In keeping with the recognized concepts of fairness culminating recently in, among other cases, *Massiah v. United States* (1964), 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. (2d) 246; *Malloy v. Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. (2d) 653, and *Escobedo v. Illinois* (1964), 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. (2d)

977, the rights of the accused should adhere at the time he and the State became adversaries in fact. It is respectfully urged that these rights should not be considered waived until he is intelligently apprised of his status and advised of his rights. To compromise these personal rights should not be merely harmless error or exclude those portions of evidence only directly affected thereby. The practices sanctioned by the "John Doe" statute and administered by the magistrate are condemned by the precepts of the Fifth and Fourteenth Amendments.

It is further respectfully submitted, under the circumstances in this case, that where the pretrial proceedings with respect to the accused were tainted as set forth herein, and his rights compromised and it being admitted by the State's demurrer that the criminal complaint and warrant against the petitioner were based upon the statutory "John Doe" proceeding, the only adequate remedy and deterrent is to declare the proceeding unlawful and its work product null and void.

In *Culombe v. Connecticut* (1961), 3o7 U.S. 568, 81 S.Ct. 1860, 6 L.Ed. (2d) 1037, this Court recognized the principle that the violation of a personal right was no longer merely evidentiary in character so as to operate to exclude it, but that it was a "substantive right" as are those of property, freedom of speech, freedom of assembly, and the right to counsel in serious cases.

In *Ker v. California* (1963), 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. (2d) 726, this Court ruled that due process requirements precluded the states from examining such cases purely from an admissibility aspect and that its prescribed fundamental criteria under the Constitution were henceforth to be enforced on the individual states.

It is urged that compliance with Constitutional mandates as to personal rights should be made essential juris-

dictional prerequisites. *Johnson v. Zerbst* (1938), 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461.

The limit of the full control which the state has in the proceedings of its courts in criminal cases should be subject at least to the qualification that such procedure is not to work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. *West v. Louisiana* (1904), 194 U.S. 258, 263, 24 S.Ct. 650, 48 L.Ed. 965. And these, it is respectfully urged, should include all personal rights guaranteed by the first eight amendments and particularly the Fifth Amendment rights.

It is respectfully submitted that the Wisconsin Supreme Court has erred in its interpretation of the meaning and application to the State of this Court's decisions with respect to the application and requirements of the Fifth and Fourteenth Amendments, particularly insofar as these Amendments are discussed in its decision as set forth at the end of the Statement of the Case.

It is urged that the Court consider and contrast what has been determined to meet the minimal requirement of due process as to the rights of the accused in the military, in the procedure substituted for the Grand Jury procedure, as set forth clearly and succinctly in the Manual for Courts-Martial, United States, 1951, article 34, p. 45:

> "b. Advising the accused. — At the outset of the investigation the accused will be informed of the following: The offense charged against him; the name of the accuser and of the witnesses against him as far as then known by the investigating officer; the fact that charges are about to be investigated; his right to have counsel represent him at the investiga-

> tion if he so desires, as provided in Article 32; his right to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense, extenuation, or mitigation; his right to have the investigating officer examine available witnesses requested by him; his right to make a statement in any form, but that he is not required to make any statement regarding the offense of which he is accused or being investigated, and that any statement he may make may be used as evidence against him in a trial by court-martial."

It is respectfully submitted that if this Court is to approve one-man secret Grand Jury type proceedings, whether they be termed "John Doe" or by any other name, that such proceedings must have imposed upon them standards of fairness to conform them to the due process requirements of the Fourteenth Amendment. A person who is a "putative defendant" subpoenaed before such a statutory body must be assured that his Constitutional rights are protected.

CONCLUSIONS

Upon all the facts before this Court and the law applicable, petitioner prays that the Court grant this petition for the reasons hereinbefore stated in that the petitioner has been made to answer for infamous crimes, not by a presentment of or indictment of a Grand Jury as required by the Fifth Amendment, but as the result of state statutory proceedings in which the petitioner was subpoenaed to attend the secret proceeding and deceived into giving testimony as to his alleged guilt without the benefit of counsel or being advised of his status or rights and thus deprived of the personal Constitutional rights guaranteed

to him by the Fifth and Sixth Amendments and which State statutory proceeding abridged the privileges and immunities of the petitioner and he is thus deprived of his liberty without due process of law as established and measured by Federal standards, all of which, it is respectfully stated, is contrary to the Fourteenth Amendment.

Respectfully submitted,

RAY T. MCCANN
Counsel for Petitioner

APPENDIX A

WISCONSIN STATUTES

255.10 Grand jury. (1) SELECTION OF GRAND JURY LIST. Any judge may in writing order the jury commissioners to select a grand jury list within a specified reasonable time. The commissioners shall select, as provided in s. 255.04, the names of not less than 75 nor more than 150 persons to constitute such list. They shall notify the judge in writing within the time fixed in the order that they have complied therewith. They shall keep the list secret.

* * * * *

(6) TIME GRAND JURORS TO SERVE. Grand jurors shall serve during the current term of court. The judge may order them to continue during the following term, but for no longer period. The judge may discharge the grand jury at any time.

255.11 Oath of grand jurors. The judge shall administer the following oath to grand jurors before they begin performance of their duties: You, as grand jurors for the county of . . . . , do solemnly swear (or affirm, as the case may be) that you will diligently inquire as to all matters and things which come before this grand jury; that you wil keep all matters which come before this grand jury secret; that you will indict no man for envy, hatred or malice, neither will you leave any man unindicted for love, fear, favor, affection or hope of reward; and that you will indict truly, according to the best of your understanding; so help you God. The clerk of court shall deliver forthwith to each grand juror a copy of such oath.

255.14 Oaths to witnesses. The foreman of every grand jury, district attorney or other prosecuting officer who shall be before them shall have authority to administer

all oaths and affirmations in the manner prescribed by law to witnesses who shall appear before such jury for the purpose of testifying in any matter of which they have cognizance; and the foreman shall return to the court a list, under his hand, of all witnesses who shall have been sworn before the grand jury during the term, and the same shall be filed by the clerk.

255.15 District attorney, when to attend. Whenever required by the grand jury it shall be the duty of the district attorney of the county to attend them for the purpose of examining witnesses in their presence or of giving them advice upon any legal matter, and to issue subpoenas and other process to bring up witnesses.

255.17 Report progress and return indictments. Said grand jury so selected may report progress and return indictments to the court from time to time during its session and until discharged.

255.18 Procedure upon discharge of grand jury. When the grand jury is discharged the clerk shall collect all transcripts of testimony, minutes of proceedings, exhibits and other records of the grand jury, and deliver them as the jury directs either to the attorney general or to the district attorney, or upon approval of the court deliver them to the clerk of the court who shall impound them subject to the further order or orders of the court.

255.19 Indictment not to be disclosed. No grand juror or officer of the court, if the court shall so order, shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until such person has been arrested.

255.20 Votes not to be disclosed. No grand juror shall be allowed to state or testify in any court in what manner he or any other member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question.

255.21 When testimony may be disclosed. Members of the grand jury and any grand jury reporter may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before the grand jury by any person upon a complaint against such person for perjury, or upon his trial for such offense. Any transcript of testimony taken before the grand jury and certified by a grand jury reporter to have been carefully compared by him with his minutes of testimony so taken and to be a true and correct transcript of all or a specified portion of the same, may be received in evidence with the same effect as the oral testimony of such reporter to the facts so certified, but such reporter may be crossexamined by any party as to such matter.

255.22 May serve twice at same term. When the grand jury attending any court shall have been dismissed before the court is adjourned without day they may be summoned to attend again in the same term, at such time as the court shall direct, for the dispatch of any business that may come before them.

APPENDIX B

(Cover)

STATE OF WISCONSIN
CIRCUIT COURT, CRIMINAL DIVISION
MILWAUKEE COUNTY

STATE OF WISCONSIN

Plaintiff

- vs -

JOHN DOE, etal

Defendants.

SUBPOENA

Served
8/21/62

G. J. Witkowski, Sheriff

Per E. A. Michalski

STATE OF WISCONSIN: MILWAUKEE COUNTY
CIRCUIT COURT: CRIMINAL DIVISION

STATE OF WISCONSIN, Plaintiff

-vs- SUBPOENA

JOHN DOE, RICHARD ROE,
and OTHER PERSONS UNKNOWN, Defendants

State of Wisconsin } ss.
Milwaukee County }

To: Raymond W. Fleming
Chief Deputy Clerk
Criminal Courts
Safety Building
Milwaukee, Wisconsin

You are hereby commanded that laying aside all and singular your business and excuses, you be and appear before the Hon. John L. Coffey, Circuit Court Judge, at the Courthouse, Room 401,
Milwaukee, Wisconsin, on the 21st day of August, 1962, at 10:00 o'clock on the fore noon of said day, then and there to give evidence in a certain cause in which the state of Wisconsin is plaintiff and John Doe, Richard Roe, and other persons unknown are defendants then and there to be heard, on the part of the plaintiff.

HEREOF, fail not on pain of penalty which will fall thereon.

Given under my hand this 20th day of August, 1962.

/s/ John L. Coffey
Circuit Court Judge, Br. 12

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JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 777

RAYMOND W. FLEMING,

Petitioner,

vs.

MICHAEL S. WOLKE,
Sheriff of Milwaukee County,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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In The

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RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

STATEMENT OF THE CASE

The petitioner's statement of the case is substantially correct, except for the portion appearing at page 5 of the petition and reading as follows:

> "He actually had been deceived by the subpoena to believe that he was a witness on behalf of the State. Under the circumstances, he had been given no reason to even consider whether he should consult with counsel."

No such allegations appear in the record. Issue was joined on demurrer to traverse. (R. 47.)

REASONS FOR DENYING WRIT

Petitioner asks that this Court declare unconstitutional a statute providing for a "John Doe" examination or investigation by extending the grand jury requirement of the Fifth Amendment to the states.

This contention is being raised, for the first time in the proceeding, in this Court. No reference to it appears anywhere in the record, in the decision of the lower court, or in the decision of the Wisconsin Supreme Court. If the state courts below do not appear to have addressed themselves to a particular issue, it will not be considered by this Court. *Michigan National Bank v. Robertson,* (1963) 372 U. S. 591, 83 S. Ct. 914, 9 L. ed. 2d 961. On this ground alone, the petition should be denied.

We submit that the petitioner confuses the Wisconsin "John Doe" statute with the Wisconsin Statutes requiring a preliminary examination in a felony charge. (Respondent's Appendix A.) Thus, he refers to *Hurtado v. State of California,* (1884) 110 U. S. 516, 538, 4 S. Ct. 111, 292, 28 L. ed. 234 and the discussion therein to support his comment at pages 10 and 11 of his petition with respect to "the abuses arising out of the substitutions for the Grand Jury such as the 'John Doe' in the case at bar."

Hurtado did not involve any question with reference to a John Doe proceeding. The Court there dealt with the subject of a *preliminary examination* as a permissible state

substitute for a grand jury in a state proceeding. The petitioner here may not, at this time, properly challenge the right of the state to provide for a preliminary examination in lieu of a grand jury proceeding, since he has not yet been required to undergo such examination; and he is not actually making such a challenge. Hence, his argument that he should be entitled to the grand jury proceeding rather than a "John Doe" examination is not apropos, and is without merit.

The case of *Malloy v. Hogan,* (1964) 37 U. S. 1, 84 S. Ct. 1489, 12 L. ed. 2d 653, cited at page 11 of the petition, does not support the petitioner's contentions. In fact, *Malloy* actually involved a "John Doe" investigation by a referee, and the Court did not see fit to express any disapproval of such procedure. The case held only that the provisions of the Fifth Amendment relating to self-incrimination are applicable to such a proceeding, and that when the privilege against self-incrimination is raised, federal standards are applicable thereto.

Petitioner's difficulty is that nowhere in his petition for writ of habeas corpus or in his traverse of the return—*his own record, prepared by his own counsel*—does he allege that he was compelled to testify in violation of the prohibition against compulsory self-incrimination. He does not allege that he even claimed the privilege.

The fact that the petitioner was subpoenaed to testify in the "John Doe" proceeding does not raise any inference of violation of his rights. An appearance of a witness before a grand jury in response to a subpoena does not constitute a violation of the witness' constitutional right

against self-incrimination *even though the witness is later indicted by the same grand jury;* and although the witness has a right to decline to answer, the mere summoning of him before the grand jury does not afford any basis for assuming that his constitutional privilege against self-incrimination will be impaired. *United States v. Wortman,* (D. C. Ill. 1960) 26 F. R. D. 183.

The constitutional privilege against self-incrimination is not automatic; it must be invoked by the witness; and by failing to invoke the privilege, he waives it. *United States v. Holovachka,* (7th Cir., 1963) 314 Fed. 2d 345, cert. den. 374 U. S. 809, 83 S. Ct. 1695; rehearing den. 374 U. S. 859, 83 S. Ct. 1869.

We repeat that the petitioner's own record is absolutely barren of any allegation that he claimed the privilege or that it was denied.

The petitioner contends that because he was questioned "in the absence of counsel for the petitioner" (R. 21), the proceeding was illegal, and cites *Escobedo v. Illinois,* (1964) 378 U. S. 478, 84 S. Ct. 1758, 12 L. ed. 2d 977 in support. *Escobedo,* however, is of no help in that regard. That case involved a petitioner who had been arrested, and while being subsequently interrogated, *had asked for his lawyer and had been refused.* The Court stated, explicitly:

> "Nothing we have said today affects the powers of the police to investigate 'an unsolved crime,' Spano v. New York, 360 US 315, 327, 3 L ed 2d 1265, 1274, 79 S Ct 1202 (Stewart, J., concurring), by gathering information from witnesses and by other 'proper investigative efforts.' Haynes v. Washington, 373 US

> 503, 519, 10 L ed 2d 513, 524, 83 S Ct 1336. *We hold only* that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." (Emphasis supplied.)

Again, petitioner's own record is completely devoid of any allegation that during the proceeding, he had asked to consult with his counsel and had been refused that right. Very carefully, he alleges only, as above mentioned, that he was questioned "in the absence of counsel." Mere absence of counsel (totally unexplained by the petitioner's record) is not enough; and *Escobedo* does not require that such interrogation must take place in counsel's presence at all events. The case requires only that if the person being interrogated requests that he be allowed to consult with counsel, the request must be granted.

We find somewhat strange the petitioner's contention that state substitutes for a grand jury should be held unconstitutional while, at the same time, he would eliminate the grand jury also. This would be the effect if his citation of the Manual for Courts Martial, United States, 1951, article 34, p. 45 (pages 17 and 18 of the petition) were to be followed. If a grand jury should be required to conform to military investigational procedures, (which do not culminate in a jury trial presided over by a judge learned in the law), of what use would a grand jury be?

The petitioner's contention that the magistrate conducting a "John Doe" examination has unlimited discre-

tion is not correct. In *State ex rel. Niedziejko v. Coffey*, (1964) 22 Wis. 2d 392, 126 N. W. 2d 96, the court stated:

> "The presumption is that the magistrate has not abused his discretion both as to duration and scope of the proceeding. This presumption can be overcome only by specific allegation which the magistrate may contest. If the facts then show that the magistrate has extended the proceeding in duration or scope beyond the reasonable intendment of the statute, or has otherwise improperly conducted the proceeding and intends to persist, he can be restrained by writ of prohibition for abuse of discretion."

To bring this matter into focus, we must observe that if the petitioner must stand trial, it will be upon an information filed after he has had a preliminary examination by a magistrate, rather than upon an indictment by a layman grand jury. At that preliminary, he will have the right to counsel (which he would not have before a grand jury), the right of cross-examination (not afforded before a grand jury), and the right of inspection of the record and exhibits (not allowed before a grand jury). The purpose of a preliminary examination under Wisconsin law is to prevent hasty, malicious, improvident and oppressive prosecutions, to protect the accused from open and public accusation of crime, to avoid, both for the accused and the public, the expense of a public trial when unnecessary, to save the defendant from unmerited humiliation or anxiety, and to discover whether a real basis for a criminal prosecution exists. *Thies v. State*, (1922) 178 Wis. 98, 189 N. W. 539. And in felony cases (as here), the statutes contemplate that the examining magistrate shall be someone

other than the judge of the court trying the offense. *State v. Solomon,* (1914) 158 Wis. 146, 147 N. W. 640.

In contrast, the power and duty of a grand jury to investigate is original and complete, susceptible of being exercised on its own motion *and on such knowledge as it may derive from any source which it may deem proper,* and is not, therefore, dependent for its exercise on the approval or disapproval of the court. *United States v. Thompson,* (1920) 251 U. S. 407, 40 S. Ct. 289, 64 L. ed. 333. And an investigation by a federal grand jury need not be preceded by any definition whatever of crimes to be investigated or persons against whom an accusation is sought. *United States v. Neff,* (2d Cir., 1954) 212 F. 2d 297.

As additional safeguards, it is of importance to note that in a Wisconsin "John Doe" proceeding, the immunity statute, sec. 325.34 applies. (Respondent's Appendix A.) As construed in *State ex rel. Jackson v. Coffey,* (1963) 18 Wis. 2d 529, 118 N. W. 2d 930, the section covers not only a "John Doe" examination, but extends to preliminary examinations, and grand jury proceedings as well as a trial itself, and the grant of immunity (if asked for by the prosecution) must be in open court where a record thereof is made.

As of today, an immunity grant is fortified by *Murphy v. Waterfront Commission,* (1964) 368 U. S. 32, 84 S. Ct. 1594, 12 L. ed. 2d 678. This Court there held that, contrary to what had been the law on the subject, a grant of immunity by a state court extends not only to all other states, but the federal government as well. Hence, in a "John Doe" proceeding, and in a preliminary examination, the

right of a witness against self-incrimination is as adequately protected as in a grand jury proceeding—perhaps even more so, since the privilege is raised before a magistrate in such judicial examinations.

Consequently, the rights of an accused are in fact more adequately protected by the system of preliminary examination after investigation and charge than by a grand jury proceeding. The *Hurtado* decision has stood the test of time in that respect and should not be overruled as petitioner asserts.

In *Goyer v. State of Wisconsin*, (1965) — Wis. 2d —, — N. W. 2d —, not yet reported, the Wisconsin Supreme Court, in a cogent opinion, refused to declare unconstitutional the method of trial upon an information rather than upon a presentment or indictment by a grand jury. The concurring opinion of Currie, C. J., is an especially apt discussion of the matter. Chief Justice Currie there observes that prior to the ratification of the Fourteenth Amendment, a number of states which later ratified that Amendment had provisions, constitutional or statutory, that did not require presentment or indictment in all felonies; and that in Wisconsin, which did have a constitutional requirement of presentment or indictment prior to its ratification of the Amendment, the requirement was eliminated from the state constitution 3 years after ratification by Wisconsin of the Amendment, demonstrating the understanding of the people that the Fourteenth Amendment did not require the re-imposition of presentment or indictment formerly provided. Chief Justice Currie continues:

"Over the years there has been a rather steady movement away from grand jury indictments and substituting in its place the initiation of criminal prosecutions by complaint or information. Even England in 1933 abolished the grand jury. While in 1791, when the first ten Amendments to the United States Constitution containing the Bill of Rights became effective, presentment or indictment by grand jury may have been implicit in the concept of ordered liberty, it had ceased to be so regarded by many peoples when the Fourteenth Amendment was enacted and ratified. Today there are at least 21 states, in which an information is available as a substitute for a grand jury in all criminal prosecutions. United States District Judge JOHN W. OLIVER recently pointed out these pertinent facts showing the trend of opposition to the grand jury: William Howard Taft in 1915 testified against the grand jury before the New York State Constitutional Convention; in 1920 the American Judicature Society joined the ranks of those favoring complete abolition; in 1928 the American Law Institute recommended that all criminal prosecutions be commenced by information alone; and the Wickersham Commission's report in 1931 to President Hoover recommended that grand juries be abolished."

CONCLUSIONS

The petitioner does not allege anything in his own record to indicate that any of his constitutional rights have in any manner been violated. As the Wisconsin Supreme Court has clearly stated in this case, he will have ample and adequate opportunity to show, if he can, that there has been a violation of his rights, and he may do so before trial.

But on the record before this Court, and under the decisions herein cited, no such violations exist.

In consequence, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

RESPONDENT'S APPENDIX A

RESPONDENT'S APPENDIX A

WISCONSIN STATUTES INVOLVED

"954.04 Prisoner taken before magistrate. Except as provided otherwise in s. 954.034, every person arrested upon a warrant shall be taken before the magistrate before whom it is returnable or if he is unable to attend before another magistrate of the same county. In cases not triable before the magistrate, the defendant shall not be required to plead."

"954.05 Adjournments of hearing. (1) The magistrate may adjourn the examination from time to time, but not exceeding 10 days at one time without the consent of the defendant, and to any place in his county, and the defendant shall be committed in the meantime unless he is bailed.

"(2) If he is not bailed, the magistrate shall order him committed to await examination on a day named in the commitment. On the appointed day he shall be brought before the magistrate."

"954.06 Forfeiture of bail. If the defendant does not appear for his preliminary examination as required by the bail bond, the magistrate shall record the default and shall certify the bond with the record of default to the circuit or county court; and like proceedings shall be had therein as upon a breach of a bond for appearance before that court. The magistrate may reissue the warrant or capias or issue another warrant for the arrest of the defendant."

"954.08 Preliminary examination; separation of witnesses; transfer of examination. (1) WITNESSES EXAMINED AND CROSS-EXAMINED. As soon as may be, the magistrate shall swear and examine or

permit the district attorney to examine the witnesses for the state, in the presence of the defendant, in relation to the crime charged in the complaint; and they may be cross-examined. Then the witnesses for the defendant shall be sworn and examined and may be cross-examined. The defendant may be assisted by counsel.

"(2) SEPARATION OF WITNESSES. During the examination, the magistrate may exclude from the place of examination all witnesses until they are called to testify; and he may also direct that persons who are expected to be called as witnesses be kept separate until called; and he may prevent them from communicating with one another until they have been examined.

"(3) TRANSFER OF EXAMINATION. If it is inconvenient or impractical for the magistrate before whom the defendant is first brought to proceed with the examination within 10 days, the magistrate may transmit the case to another qualified magistrate of the county and he shall proceed with the examination."

"954.09 Change of venue. If a defendant files an affidavit before the examination begins that he believes that the magistrate will not decide impartially in the matter, the magistrate shall transmit the case to the nearest magistrate qualified to conduct the examination, except that if the magistrate is a judge of a multi-branch court, then the matter shall be referred to the clerk of said court who shall, in accordance with the rules of court, assign said matter to another branch of that court to attend and conduct the examination in said matter. If the crime is bailable, and sufficient bail is given, the removing magistrate shall bail the defendant for his later appearance before the magistrate to whom the case is transmitted. No case shall be re-

moved after a second adjournment, and only one removal shall be allowed. No such affidavit shall name more than one county judge. If there are 2 or more defendants and less than all join in the affidavit of prejudice then the examining magistrate shall be changed as to all the defendants."

"954.10 Exclusion of public. If the defendant is accused of a crime against chastity or morality or decency, the magistrate may exclude from the hearing all persons not officers of the court or otherwise required to attend."

"954.11 Testimony to be written. The testimony shall be written by the magistrate or under his direction."

"954.12 Discharge; when complaint to pay costs. If it appears to the magistrate upon the examination that no crime has been committed or that there was no probable cause for charging the defendant with a crime, he shall be discharged. If the magistrate certifies in his docket that the complaint was malicious and without probable cause, he shall enter judgment against the complainant and in favor of the county for the taxable costs of the proceeding, and thereafter proceedings shall be as provided in s. 960.22."

"954.13 Commitment, trial, bail. (1) If it appears probable that a felony has been committed and that the defendant is probably guilty, he shall be committed to await trial in either county court or circuit court at the discretion of the magistrate, except in counties having a population of 500,000 or more he shall be committed to await trial in the circuit court. If the felony

is bailable by the magistrate and a sufficient bail is offered he shall be released."

"954.17 Examinations returned to court. All examinations and the evidence and bonds taken by a magistrate shall be certified and returned by him within 10 days to the clerk of the court before which the defendant is bound to appear."

"325.34 Incriminating testimony compelled; immunity. Whenever any person shall refuse to testify or to produce books, papers or documents when required to do so in any criminal examination, hearing or prosecution for the reason that the testimony or evidence required of him may tend to criminate him or subject him to a forfeiture or penalty, he may nevertheless be compelled to testify or produce such evidence by order of the court on motion of the district attorney. But no person who testifies or produces evidence in obedience to the command of the court in such case shall be liable to any forfeiture or penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence; but no person shall be exempted from prosecution and punishment for perjury committed in so testifying."

CERTIFICATE OF SERVICE

I, Robert D. Martinson, a member of the Bar of this Court, hereby certify that I have this day served the foregoing Respondent's Brief Opposing Petition for Writ of Certiorari upon the Counsel of Record for the Petitioner herein, by mailing a copy thereof with first class postage prepaid, addressed as follows:

Ray T. McCann
Attorney at Law

152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Dated this 21st day of January, 1965.

ROBERT D. MARTINSON
Assistant Attorney General
of Wisconsin

Counsel of Record for Respondent

Office-Supreme Court, U.S.
FILED
FEB 4 1965
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 777

RAYMOND W. FLEMING
Petitioner,

-versus-

MICHAEL S. WOLKE,
Sheriff of Milwaukee County,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 777

RAYMOND W. FLEMING

Petitioner,

-versus-

MICHAEL S. WOLKE,
Sheriff of Milwaukee County,

Respondent.

REPLY TO RESPONDENT'S BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The petitioner was the accused and putative defendant before the "John Doe" at the time of his appearance by subpoena. This was unknown to him nor was he informed of such status until the conclusion of his testimony at the secret inquiry.

He was subpoenaed by the State to give evidence in the proceedings conducted for the purpose of establishing and inquiring into his guilt. He was, in fact, misled by the subpoena and by its very terms to believe he was to give evidence *on behalf* of the State and not against himself. He was served with this subpoena on the very morning he was to appear. The statement objected to by the respondent is established by the very words of the subpoena, and the inferences reasonably drawn therefrom. The issue of the subpoena and the compulsion therein and thereby to give testimony had been duly raised prior to this Petition. The issue thus raised was treated in the following language by the Wisconsin Supreme Court in disposing of this question and the questions with respect to the constitutionality of the "John Doe" statute and the proceedings conducted thereunder:

> "The other arguments of the defendant do not involve questions of jurisdictional defects or the facts do not constitute such a defect. The form of the subpoena used in the John Doe proceeding did not deprive the magistrate of jurisdiction to issue the warrant. If the defendant believes the subpoena was improper he could have refused to testify; having testified, the defendant waived his objection. Nor does the defendant's argument that he was compelled to testify while a suspect in violation of the Fifth and Fourteenth amendments of the United States constitution raise a jurisdictional question. The Fifth amendment is now applicable in effect to state proceedings by virtue of the Fourteenth amendment. Malloy v. Hogan (1964), 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. (2d) 653. If the defendant should not have been interrogated while a suspect without warning or advice that he was a suspect, his testimony was illegally obtained and the question of its use can be raised by a proper motion to suppress under sec. 955.09, Stats."

REPLY TO RESPONDENT'S STATEMENT OF REASONS FOR DENYING THE WRIT

I

Contrary to the respondent's statements of the basis of the Petition, it is not based on nor so narrowly limited to declaring the "John Doe" statute unconstitutional. The complete grounds have been repeatedly urged and stated in terms of the violation of the petitioner's rights, privileges, and immunities under the United States Constitution.

All the substantive grounds forming the basis of the Petition before this Court have been at issue, argued, and presented at all stages of the *habeas corpus* proceedings and prior to this Petition. The respondent specifically recognized the issue of the constitutionality of the statute in its appeal to the Wisconsin Supreme Court from the dismissal of the charges by the trial court and stated as follows in its brief arguing at page 17, under the Title:

> "III. EVEN IF THE DEFENDANT HAS STANDING TO CHALLENGE THE VALIDITY OF THE JOHN DOE BY THIS HABEAS CORPUS PROCEEDING, THE JOHN DOE IS VALID AND ITS USE HAS DEPRIVED DEFENDANT OF NONE OF HIS RIGHTS."

It argued specifically at page 18:

> "The *constitutionality of section 954.025, Stats.*, authorizing a John Doe investigation has been recently upheld by this Court in State ex rel. Jackson v. Coffey (1963), 18 Wis. 2d 529, 545-546, 118 N.W. 2d 939, and more recently, this Court has upheld the validity of the John Doe proceeding in question, State ex rel. Niedziejko v. Coffey (1964), 22 Wis. 2d 392."

The unconstitutionality of the "John Doe" statute was not claimed by the petitioner in the manner that respondent indicates. It was raised specifically in terms of the Fourteenth Amendment and was repeatedly urged in that form. This issue was succinctly urged again at page 13 of the Brief of Defendant in Error on Motion For Rehearing under the title:

> "The John Doe Statute Sec. 954.025 Stats. Is Unconstitutional as Violative of the Due Process Required by the Fourteenth Amendment."
>
> * * * *
>
> "There is a serious question as to the constitutionality of the whole statute, aside from the unconstitutional grant of Star Chamber or inquisitorial powers. It is manifest that if in law the magistrate did act within the powers and jurisdiction granted to him by the statute on the basis of the entire record before the Court, then this statute avoids the requirements of due process, dictated by the Fourteenth Amendment. If a person accused can be compelled by subpoena under the pretext of giving evidence on behalf of the state at a secret proceeding without being informed of his status, without the right of counsel as guaranteed to an accused by the Sixth Amendment to the Constitution, compelled to give testimony under such circumstances without being advised of any of his rights contrary to the Fifth Amendment to the Constitution, and thereafter the magistrate has the power to charge such accused with criminality following such statutory proceeding conducted aforesaid, all without doing mortal insult to the jurisdiction granted by such statute to the magistrate, then such statute is unconstitutional.
>
> "The equitable rule applicable to individuals should be applicable to the State:
>
> > A State cannot do indirectly by or under statute what it is directly or expressly prohibited from doing by the Constitution.

> "The constitutionality of such statute is brought into question by the writ; 39 C.J.S. *Habeas Corpus,* §18, p. 458. The unconstitutionality of a statute under which detention is sought to be sustained is ground for relief on habeas corpus."

The respondent cites the case of *Michigan National Bank v. Robertson* (1963), 372 U.S. 591, 83 S. Ct. 914, 9 L. Ed. (2d) 961, as authority for denying jurisdiction. It is to be noted that the Court granted Certiorari and remanded the case for further proceedings not inconsistent with its opinion which, in effect, allowed the lower Court to consider the question raised at first instance in the Supreme Court.

It is respectfully submitted, that the case in point with respect to the issues before this Court raised by the respondent is *Raley v. State of Ohio* (1959), 360 U.S. 423, 79 S. Ct. 257, 3 L. Ed. (2d) 1344, at page 436:

> "The assignments of error made by Mrs. Morgan in the State Supreme Court show that she claimed in that court that the judgment of conviction was violative of due process, as guaranteed by the Federal Constitution, in that while she claimed the privilege, she was not 'charged with refusal to answer any questions asked by members of the Commission and that she was not notified that her claim of the privilege was rejected by the Commission.' The State Supreme Court passed on this claim, holding that a direction to answer was unnecessary because of the immunity statute, and stated generally that its reasoning and conclusions in her case 'apply with equal force to the appeal of Raley, Stern and Brown, 164 Ohio St. at page 532, 133 N.E. 2d at page 108. *There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.* See Manhattan Life Ins. Co. of New York v. Cohen, 234 U.S. 123, 134, 34 S. Ct.

874, 877, 58 L. Ed. 1245. *We think this sufficient here to satisfy the statutory requirement that the federal right sought to be vindicated in this Court be one claimed below.* 28 U.S.C. §1257(3), 28 U.S.C.A. §1257(3)." (Emphasis supplied)

II

The respondent has admitted that the petitioner was the accused when he was subpoenaed to appear before the "John Doe". Respondent also admits that the petitioner was never advised of his rights or status prior to the completion of his testimony before the "John Doe". Contrary to the facts in the case cited by the respondent—*United States v. Holovachka* (7th Cir., 1963), 314 Fed. 2d 345, cert. den. 374 U.S. 809, 83 S. Ct. 1695: rehearing den. 374 U.S. 859, 13 S. Ct. 1869—the petitioner herein was not a lawyer, did not appear in public hearing, and was never asked whether he wished to claim privilege, or that he could claim privilege, or whether he waived privilege, as were the facts in the case cited.

The inquiry complained of was not a police investigation but was in the nature of a judicial proceeding and was accusatorial and it secretly focused on the Petitioner as the accused and putative defendant.

III

The Petitioner's complaint about the "John Doe" as a Grand Jury substitute is not as limited or as stated by respondent. All the authorities and statutes cited by respondent as to how his future rights and privileges will be protected in the contemplated hearings and proceedings on the infamous crimes that he has been held to answer for as a result of the "John Doe" proceedings are held for naught. It is analogous to promising a man who

has been rendered totally blind that now every effort will be made to preserve his eyes. The petitioner's rights were compromised in the "John Doe". The charges of infamous crimes that he has been made to answer for were spawned from such hearing. No matter how legal, pious, and righteous the future hearings and proceedings may be, they cannot legitimately endow or restore those compromised rights with respect to or as they relate to the infamous crimes charged as a result of the "John Doe". The preliminary hearing with all its safeguards during such hearing becomes a mockery and travesty on Justice when applied after the warrant and complaint have already issued out of the "John Doe". The dirty deed has already been done. The faulty foundation laid by the "John Doe" cannot be adequately corrected without removal of all the charges which rest on or resulted from such proceeding.

IV

In *Fay v. Noia* (1963), 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. (2d) 837, the long history of the writ for *habeas corpus* as used in the case at bar was reviewed. It unequivocally established that it is properly issued, as in the case at bar, where fundamental rights have been violated. This court specifically stated as recognized by the trial court, but contrary to the ruling of the Supreme Court of Wisconsin, that *habeas corpus* is not available only to inquire into the jurisdiction in a narrow sense, of the committing magistrate. Also see: *Blackstone Commentaries,* 129-132; *Carbo v. U. S.* (1961), 364 U.S. 611, 81 S. Ct. 338, 5 L. Ed. (2d) 329.

V

The respondent cites as ruling authority the recent case of *Goyer v. State of Wisconsin* (1965), 26 Wis. (2d) 00, 131 N.W. (2d) 888, and quoted extensively from this decision. For the purpose of a complete citation, the last paragraph of the decision following the portion cited by respondent reads as follows, at page 892:

> "While some present justices of the United States supreme court favor incorporation of all provisions of the Bill of Rights into the Fourteenth amendment, it seems unlikely that a majority of the court will so decide thus freezing upon the states compulsory presentment or indictment by grand jury when so many jurists and students of criminal law do not regard it as essential to ordered liberty, and the trend for many years has been steadily toward its abolition."

VI

The respondent's argument concerning the "John Doe" statute and the unlimited discretion granted to the magistrate to the effect that by its terms there is a presumption that the magistrate will not abuse his discretion. If he does abuse his discretion, this abuse of discretion can be corrected prospectively but is of no relief to the person whose rights have already been abused or compromised by the magistrate's indiscretion. This is a justification put forth for a form of Star Chamber proceeding. It is fundamental that under the concepts of ordered liberty and a nation dedicated to the proposition of a nation of men under law, and not the contrary, that such proceedings which leave all the rights of a person to the discretion of the magistrate who has the power of a court to subpoena anyone before his secret inquiry under the

presumption that he will not abuse them is a clear invitation to tyranny.

Discretion is defined in *Black's Law Dictionary,* Third Edition, page 587 initially as:

> "Power or privilege of the court to act unhampered by legal rule. Osborn v. United States Bank, 9 Wheat. 866, 6 L. Ed. 204;"

Lord Camden stated in *Hindson v. Kersey* (1765), 8 How. St. Tr. 57 Fn.:

> "The discretion of a Judge is the law of tyrants: it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion, to which human nature is liable."

VII

The Petition for Certiorari begs for definition of a magistrate's discretion as it affects the rights and privileges of a United States citizen.

The petitioner, at the very inception of the proceedings which were commenced to make him answer for the infamous crimes resulting from the proceedings conducted under the "John Doe" statute, urged his constitutional rights as a United States citizen and petitioner did so specifically by and in the petition and traverse for the writ of *habeas corpus*. He has in all stages of these proceedings relied upon, argued, and urged the relief guaranteed to him by the Fourteenth Amendment to the United States Constitution for the rights, privileges, and immunities compromised by the State, and also contrary to the Fifth and Sixth Amendments. The Supreme Court of

Wisconsin interpreted their applicability, but it is respectfully submitted, did so erroneously.

CONCLUSION

It is respectfully submitted that this Court has jurisdiction of the Petitioner. The Supreme Court of Wisconsin has erred in interpreting the United States Constitution and its Amendments to the effect that statutory proceedings which permit and violate the rights and privileges of a United States citizen who is made to answer for infamous crimes as a result thereof, that any errors or abuses of his constitutional rights in or by such proceedings were mere judicial or harmless error, or they were waived or they can be cured by rules of evidence.

The Constitution and its amendments as they provide guarantees of certain rights to individuals are to be respected and protected, and not subject to the harmless error rule, waiver without proof of affirmative knowledge of rights, interpreted merely by rules of evidence or their violation allowed as judicial error.

Respectfully submitted,

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